

**RECEIVED  
CENTRAL FAX CENTER**

JUL 10 2006

**MARTIN & FERRARO, LLP  
1557 Lake O'Pines Street, NE  
Hartville, Ohio 44632**Telephone  
(330) 877-0700Facsimile  
(330) 877-2030

---

**FACSIMILE TRANSMITTAL**

---

**TO:**Name: Mail Stop AF  
Group Art Unit 3764/Examiner Michael Brown

Firm: U.S. Patent &amp; Trademark Office

Fax No.: 571-273-8300

Subject: U.S. Patent Application No. 09/605,001

Gary Karlin Michelson

Filed: June 27, 2000

APPARATUS AND METHOD OF INSERTING

SPINAL IMPLANTS

Attorney Docket No. 101.0044-04000

Customer No. 22882

Confirmation No.: 5171

**FROM:**

Name: Thomas H. Martin, Esq.

Phone No.: 330-877-2277

No. of Pages (including this): 8

Date: July 10, 2006

Confirmation Copy to Follow: NO

---

**Message:****CERTIFICATE OF TRANSMISSION UNDER 37 CFR 1.8**

I hereby certify that the attached Transmittal Form (in duplicate; \$620.00 total amount to cover the \$120 one-month extension fee and \$500 Notice of Appeal fee is to be charged to Deposit Account No. 50-3726), Notice of Appeal, and Form PTO/SB/33 with Pre-Appeal Brief Request for Review are being facsimile transmitted to the U.S. Patent and Trademark Office on July 10, 2006.

  
Sandra L. Blackmon

If there is a problem with this transmission please call Sandy Blackmon at 330-877-1202 or the sender at the number above.

---

The information contained in this facsimile message is privileged and confidential information intended only for the use of the addressee listed above. If you are not the intended recipient or the employee or agent responsible to deliver this message to the intended recipient, please do not use this transmission in any way, but contact the sender by telephone.

PATENT  
Attorney Docket No. 101.0044-04000  
Customer No. 22882

**NOTICE OF APPEAL TO THE  
BOARD OF PATENT APPEALS AND INTERFERENCES**

**RECEIVED  
CENTRAL FAX CENTER**

In re Application of:	)	Confirmation No. 5171
Gary Karlin Michelson	)	
Serial No.: 09/605,001	)	Group Art Unit: 3764
Filed: June 27, 2000	)	Examiner: Michael Brown
For: APPARATUS AND METHOD OF	)	
INSERTING SPINAL IMPLANTS	)	

JUL 10 2006

Mail Stop AF  
Commissioner of Patents  
P.O. Box 1450  
Alexandria, VA 22313-1450

Sir:

Applicant hereby appeals to the Board of Patent Appeals and Interferences from the last decision of the Examiner.

The items checked below are appropriate:

1. ☒ A Petition for extension of time to further extend the period for response to July 14, 2006 is enclosed.
2. ☒ The Appeal Fee of \$500.00 is to be charged to Deposit Account No. 50-3726.

Please grant any extensions of time required to enter this response and charge any additional required fees to our deposit account 50-3726.

Respectfully submitted,

MARTIN & FERRARO, LLP

Dated: July 10, 2006

By:   
Thomas H. Martin  
Registration No. 34,383

Post Office Address (to  
which correspondence is  
to be sent)

MARTIN & FERRARO, LLP  
1557 Lake O'Pines Street, NE  
Hartville, Ohio 44632  
Telephone: (330) 877-0700  
Facsimile: (330) 877-2030

07/12/2006 EFLORES 00000002 503726 09605001


01 FC:1401 500.00 DA

Doc Code: AP.PRE.REQ

PTO/SB/33 (07-05)

Approved for use through xx/xx/200x. OMB 0651-00xx  
U.S. Patent and Trademark Office, U.S. DEPARTMENT OF COMMERCE

Under the Paperwork Reduction Act of 1995, no persons are required to respond to a collection of information unless it displays a valid OMB control number.

<b>PRE-APPEAL BRIEF REQUEST FOR REVIEW</b>		Docket Number (Optional)  101.0044-04000	
I hereby certify that this correspondence is being deposited with the United States Postal Service with sufficient postage as first class mail in an envelope addressed to "Mail Stop AF, Commissioner for Patents, P.O. Box 1450, Alexandria, VA 22313-1450" [37 CFR 1.8(a)]  on _____  Signature _____  Typed or printed name _____		Application Number  09/605,001	Filed  June 27, 2000
Applicant requests review of the final rejection in the above-identified application. No amendments are being filed with this request.   This request is being filed with a notice of appeal.   The review is requested for the reason(s) stated on the attached sheet(s). Note: No more than five (5) pages may be provided.		First Named Inventor  Gary Karlin Michelson  Art Unit 3764  Examiner Michael Brown	
I am the  <input type="checkbox"/> applicant/inventor.  <input type="checkbox"/> assignee of record of the entire interest. See 37 CFR 3.71. Statement under 37 CFR 3.73(b) is enclosed. (Form PTO/SB/96)  <input checked="" type="checkbox"/> attorney or agent of record. Registration number 34,383  <input type="checkbox"/> attorney or agent acting under 37 CFR 1.34. Registration number if acting under 37 CFR 1.34 _____		<div style="text-align: center;">             Signature            Thomas H. Martin            Typed or printed name            (330) 877-0700            Telephone number            July 10, 2006            Date         </div>	
NOTE: Signatures of all the inventors or assignees of record of the entire interest or their representative(s) are required. Submit multiple forms if more than one signature is required, see below*.			
<input checked="" type="checkbox"/> *Total of 1 forms are submitted.			

This collection of information is required by 35 U.S.C. 132. The information is required to obtain or retain a benefit by the public which is to file (and by the USPTO to process) an application. Confidentiality is governed by 35 U.S.C. 122 and 37 CFR 1.11, 1.14 and 41.6. This collection is estimated to take 12 minutes to complete, including gathering, preparing, and submitting the completed application form to the USPTO. Time will vary depending upon the individual case. Any comments on the amount of time you require to complete this form and/or suggestions for reducing this burden, should be sent to the Chief Information Officer, U.S. Patent and Trademark Office, U.S. Department of Commerce, P.O. Box 1450, Alexandria, VA 22313-1450. DO NOT SEND FEES OR COMPLETED FORMS TO THIS ADDRESS. SEND TO: Mail Stop AF, Commissioner for Patents, P.O. Box 1450, Alexandria, VA 22313-1450.

If you need assistance in completing the form, call 1-800-PTO-9199 and select option 2.

**RECEIVED  
CENTRAL FAX CENTER****RESPONSE UNDER 37 C.F.R. 1.116  
EXPEDITED PROCEDURE  
EXAMINING GROUP 3764**

JUL 10 2006

PATENT  
Attorney Docket No. 101.0044-04000  
Customer No. 22882**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE**

In re Application of:	)	Confirmation No. 5171
Gary Karlin Michelson	)	
Serial No.: 09/605,001	)	Group Art Unit: 3764
Filed: June 27, 2000	)	Examiner: Michael Brown
For: APPARATUS AND METHOD OF	)	
INSERTING SPINAL IMPLANTS	)	

Mail Stop AF  
Commissioner for Patents  
P.O. Box 1450  
Alexandria, VA 22313-1450

Sir:

**PRE-APPEAL BRIEF REQUEST FOR REVIEW**

In reply to the Final Office Action of March 14, 2006, Applicant submits the following remarks for consideration by the Members of the pre-appeal brief conference.

**I. Brief Background**

The application includes nine independent claims generally drawn to instruments and methods for use in spinal surgery, of which five have been allowed. Independent claims 121, 122, 125, and 127 stand rejected. In response to an Office Action mailed June 14, 2005, Applicant submitted a Reply dated November 29, 2005 traversing the Examiner's rejections under 35 U.S.C. §§ 112, first paragraph and 102(b). The Examiner mailed a Final Office Action on March 14, 2006 maintaining the rejections.

**II. Clear Errors**

(1) The Examiner's rejection of claims 125-127 and 129 under 35 U.S.C. § 112, first paragraph is erroneous because Applicant has support in the specification and the drawings for the retractor arms of the retractor being "stationary" relative to the

Pre-appeal Brief Request 7-10-06.doc

Application No. 09/605,001  
Pre-Appeal Brief Request For Review dated July 10, 2006  
Reply to Final Office Action of March 14, 2006

retractor. (See November 2005 Amendment, page 9, paragraph 4 and paragraph bridging pages 9 and 10).

(2) The Examiner's rejection of claims 121-129 under 35 U.S.C. § 102(b) as being anticipated by U.S. Patent No. 4,878,915 to Brantigan is erroneous because:

(a) Brantigan does not disclose "each retractor arm defining a first vertebra supporting surface to contact a first vertebra and a second vertebra supporting surface to contact a second vertebra" as recited in independent claim 121 (see November 2005 Amendment, page 10, paragraph 1);

(b) Brantigan does not disclose the step of "distracting the adjacent vertebrae by at least partially inserting the distal end portion of the sleeve member within the intervertebral space" as recited in independent claim 122 (see November 2005 Amendment, page 10, paragraph 2);

(c) Brantigan does not disclose the step of "distracting the adjacent vertebrae to a predetermined distracted position by at least partially inserting the retractor arms within the intervertebral space" as recited in independent claim 125 (see November 2005 Amendment, page 10, paragraph 2); and

(d) Brantigan does not disclose first and second retractor arms "having opposed distracting surfaces, the distracting surfaces of each retractor arm laterally spaced with respect to the longitudinal axis at a predetermined distraction distance sufficient to distract the opposed tissue portions upon insertion thereof" as recited in independent claim 127. (See November 2005 Amendment, page 10, paragraph 3).

### III. Conclusion

In view of the foregoing remarks, it is respectfully submitted that the claims are patentable. Therefore, it is requested that the Members of the Pre-Appeal Brief Conference reconsider the outstanding rejections in view of the preceding comments. Issuance of a timely Notice of Allowance of the claims is earnestly solicited.

To the extent any extension of time under 37 C.F.R. § 1.136 is required to obtain entry of this reply, such extension is hereby respectfully requested. If there are any


Application No. 09/605,001  
Pre-Appeal Brief Request For Review dated July 10, 2006  
Reply to Final Office Action of March 14, 2006

fees due under 37 C.F.R. §§ 1.16 or 1.17 which are not enclosed herewith, including any fees required for an extension of time under 37 C.F.R. § 1.136, please charge such fees to our Deposit Account No. 50-3726.

Respectfully submitted,

MARTIN & FERRARO, LLP

Dated: July 10, 2006

By:   
Thomas H. Martin  
Registration No. 34,383

1557 Lake O'Pines Street, NE  
Hartville, Ohio 44632  
Telephone: (330) 877-0700  
Facsimile: (330) 877-2030